IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

SOUTHERN DIVISION

JOHN DOE 1 et al.,	) CIVIL ACTION
	) NO. PJM-21-356
Plaintiffs,	)
	)
v.	)
	)
MONTGOMERY COUNTY BOARD OF EDUCATION et al.,	)
	)
Defendants.	)

TRANSCRIPT OF MOTIONS HEARING PROCEEDINGS
BEFORE THE HONORABLE PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE
WEDNESDAY, MAY 3, 2023; 2:00 P.M.
GREENBELT, MARYLAND

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(Call to order of the court.)

THE COURT: Good afternoon, ladies and gentlemen. Have your seats, please.

(Counsel reply, "Good afternoon, Your Honor.")

THE DEPUTY CLERK: The matter now pending before the Court is Civil Action No. PJM-21-356, Doe 1 et al. v. Montgomery County Board of Education et al. The matter now comes before the Court for a continued motions hearing.

THE COURT: All right. Counsel, identify yourselves first for Plaintiffs and then for Defendants.

MR. MALONEY: Good afternoon, Your Honor. Timothy Maloney and Alyse Prawde in the gallery on behalf of John Doe No. 4.

MR. RUFF: Good afternoon, Your Honor. Malcolm Ruff on behalf of John Doe Plaintiffs 1 and 2.

THE COURT: I'm sorry. Malcolm Ruff?

MR. RUFF: Yes, Your Honor.

THE COURT: Oh, I'm sorry. Mr. Murphy, you are an additional person so I lost the sequence here. Go ahead, Mr. Ruff.

MR. RUFF: Thank you, Your Honor. Malcolm Ruff on behalf of Doe Plaintiffs 1 and 2.

MR. MURPHY: And William H. Murphy, Jr. on behalf of Doe Plaintiffs 1 and 2.

MR. DeGONIA: Good afternoon, Your Honor. Tom

DeGonia and Jerry Hyatt in the gallery on behalf of Doe No. 3.

THE COURT: And for the Defendants?

MS. KANE: Good afternoon, Your Honor. Patty Kane and Jackie Allen at counsel table, with Meg Turlington in the gallery, on behalf of the Defendants Board of Education, Jeffrey Sullivan, Casey Crouse, Eric Wallich, and Vinny Colbert.

MR. KARPINSKI: Good afternoon, Your Honor. Kevin Karpinski on behalf of Defendant Joseph Doody.

THE COURT: Thank you, folks.

We are here today for me to render an oral opinion in this case with respect to various motions for summary judgment that have been filed. I am going to do something a little unusual today, though, and it is the following, maybe taking a page from the Supreme Court, more or less. I am going to deliver an oral opinion, but as I prepared my notes with my law clerk over the last several days, I have come very close to a final written opinion, but it isn't quite what I want it to be.

What I do in many of these cases is give an oral opinion in a case and then indicate what my board rule will be in the case, and then I will say in the order, For the reasons stated in the record, the Court orders as follows, and then the official record is what the court reporter writes as to what I say. And that will be the case here today.

I will say certain things, and whatever she types out is

going to be the official memorandum opinion in the case, and I will indicate orally what the order will be and also that it will be filed today or tomorrow with a written order which effectively says, For the reasons stated on the record, the Court orders thus and so.

Now, this is a somewhat different thing which I am proposing to do. I got pretty far with my law clerk on this opinion, but it's not quite what I want it to be officially. On the other hand, it's not much less than what would be transcribed by the court reporter today.

This is a complicated case with a lot of variations, and I thought that I would do the following: After I have delivered my oral opinion today, I am going to distribute copies of my notes because I think it will give you a much clearer idea of what's happening in this case. That is not the official opinion in the case, but you will find, if you order the transcript, and you should, that there is going to be a very close connection between the two. Any inconsistency, it's the way in which the court reporter transcribes it which is the official record.

I don't know that I have done this before, but I don't think there is any law against it, and it seems to me that it will -- rather than having you try to follow everything that I have said in a rather extensive case, this scorecard may help you a bit in understanding where we are going.

So that's the background. I am not handing it out to you before I give the opinion because I don't want you to be reading it while I am talking, but I think if you follow it, you will understand where I am going, and then we will see where we come out.

MR. MURPHY: Your Honor, I have a question.

THE COURT: Well, I am not really going to entertain any, Mr. Murphy, today.

MR. MURPHY: I just wanted to know if you were going to pay for the transcript? It was a joke, Your Honor.

THE COURT: Oh, okay. Let's not joke, then, and let's stay in order, if you will. I am not inviting comments from counsel today. I don't want to be interrupted. My ruling is my ruling. And whatever follow up you think you need, you can follow, but I really ask counsel not to interrupt me when I am speaking today.

As I said, the purpose of the hearing today is to deliver an oral opinion with respect to various motions for summary judgment. And the Court heard the following motions during oral argument a few days back: They included Defendant Doody's motion for summary judgment with respect to Doe Family No. 1, ECF No. 222; Defendant Doody's motion for summary judgment with respect to Doe Families 2, 3, and 4, ECF No. 223; and Defendants Board of Education, Vincent Colbert, Casey Crouse, Jeffrey Sullivan, and Eric Wallich's motion for summary

judgment as to John Doe, the first second amended complaint, at ECF No. 227; and Defendants Board of Education, Vincent Colbert, Casey Crouse, Jeffrey Sullivan, and Eric Wallich's motion for summary judgment as to claims of John Does 2M, 3, and 4M's claims, ECF No. 228.

Now, there are a few preliminary matters that I want to address. First, with respect to the Parent-Plaintiffs and whether they should remain in the case now that their children have -- some of the children, some of the young Plaintiffs have reached the age of majority.

The Court faced this issue once before with respect to Doe No. 1. The Court held then that the Parent-Plaintiffs did not have standing to bring claims in a representative capacity on his behalf for alleged constitutional violations against -- that he claims occurred once he reached adulthood. And that was at ECF No. 89 at pages 12 and 13.

The Court also held in that opinion that the Parent-Plaintiffs did not have standing to pursue their own claims for out-of-pocket expenses once their children reached adulthood, but that, presumably, they could be pursued by the adult children themselves.

But during oral argument recently on the motions for summary judgments, Plaintiffs appeared amenable to dismissing the remaining parents so long as Defendants would stipulate that the now adult Does would be able to recover for any

pre-majority claims, and Defendants conceded they would be agreeable to this.

And although the Court is inclined to dismiss all the claims brought by the Parent-Plaintiffs at this time, Jane Doe 2, John Doe 4, and Jane Doe 4, for now, the Court is going to hold off doing so. It's not really critical to deciding that matter, and we will just leave it in place. The outcome, I think, will not be different.

There are certain counts that are not before the Court on summary judgment, which is to say they will move forward irrespective of how the Court rules today.

Count One, negligence claims of Does 2 through 4 as to all Defendants, have not been challenged on summary judgment. They remain in the case whatever the Court might say.

Count Two, gross negligence, claims of Does 2 through 4 as to Defendant Sullivan, likewise remain in the case and have not been challenged.

Count Three, gross negligence, claims of Does 2 through 4 as to Defendant Crouse, at this point, the Court has no challenge to that claim.

As to Count Five, gross negligence, claims of Does 2 through 4 as to Defendant Wallich, also remain in the case.

And as to Count Six, gross negligence, claims of Does 2 through 4 as to Defendant Colbert, remain in the case.

There are certain other aspects of Defendants' various

motions for summary judgment that are unopposed by the Plaintiffs, and, accordingly, summary judgment will be entered as to those claims.

As to Count Eight, the 1983 claim against Defendant Sullivan, the summary judgment claim is granted as to Defendant Sullivan on Count Eight, the 1983 claim, as to Plaintiff Doe 1, and with respect to Does 2 through 4, only with respect to the state-created danger theory.

The Court will proceed to rule on the other aspect of that claim when I get to the 1983 claim.

Count Nine is a 1983 claim against Defendant Crouse. Summary judgment is granted to Defendant Crouse on Count Nine as to the 1983 claim of Doe No. 1.

Count Ten, which is a 1983 claim against Defendant Wallich, summary judgment is granted as to Defendant Wallich on Count Ten, the 1983 claim, as to Does 1 through 4 with respect only to the state-created danger theory at this point.

Again, these aspects of summary judgment are being granted because they are unopposed by the Plaintiffs.

Now, having resolved those preliminary matters, the Court proceeds with its opinion count by count. Just so you understand, this will all be converted into the particular motions that are before the Court, but as you know, I have proceeded count by count, and it seems to me that's the easiest way to discuss what we have before us.

First let's look at the summary judgment standard. The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law, pursuant to Federal Rule of Civil Procedure 56(a).

A genuine dispute is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party. Here, the Court cites *Dulaney* at 673 F.3d 323 at 330, a Fourth Circuit case from 2012.

A material fact is one that might affect the outcome of the lawsuit given the relevant law. The Court here cites *Erwin*, which is at 591 F.3d 313 at 320, a Fourth Circuit opinion from 2010.

When considering a motion for summary judgment, the Court views the record in the light most favorable to the non-moving party and draws all reasonable inferences in his or her favor. Again, pursuant to the *Dulaney* case, 673 F.3d 330.

We turn first, then, to Count One, negligence.

In the second amended complaint, all Plaintiffs have sued all Defendants for negligence. That is Count One.

On summary judgment, Defendants have only challenged the negligence claim of Doe 1 against them. Defendants do not challenge the negligence claims of Does 2 to 4.

The elements of negligence are, first, that the Defendant owed a duty to the Plaintiff; second, that the Defendant

breached that duty; third, that the Defendants' breach was a direct and proximate cause of the Plaintiff's injury; and fourth, that Plaintiff suffered some kind of harm.

It has been said that summary judgment is rarely appropriate with respect to negligence claims. Here citing *Spaulding*, 498 F.2d 517 at 518, a Fourth Circuit case from 1974.

Defendants do not dispute that Doe No. 1 suffered harm. What they argue is that, first, they did not have a duty to protect him from the criminal actions of other students; second, even if they did have that duty, they did not breach it because their conduct was reasonable given the information they had at the time; and third, if they did breach a duty, such breach cannot be a proximate and actual cause of criminal actions by third parties.

Defendants concede that, as school officials, they had a duty to Doe No. 1 because, as to him, they stood *in loco parentis*, in the shoes of the parents. They argue that their duty to Doe No. 1 was limited only to protect him against foreseeable harms and that the sexual assault of Doe No. 1 by other students was not foreseeable.

In Maryland, foreseeability is usually a jury question. Here, *Goyal*, G-O-Y-A-L, at 2011 Westlaw 4380657 at page 3; *Segerman vs. Jones* at 259 A.2d 794 at 806 from the Maryland Court of Special Appeals.

The Court finds that there is a dispute of material fact here as to whether Doe No. 1's injury was foreseeable to the Defendants. Plaintiffs have cited evidence that the Montgomery County Public Schools had a policy in place requiring supervision of student athletes at all times, as well as a mandatory program of training warning against the dangers of hazing particularly in locker rooms. The Court finds that a reasonable jury could conclude that it was foreseeable to Defendants that their failure to supervise teenage boys in an athletic locker room could lead to the physical assaults of the kind that Doe No. 1 suffered.

As to whether Defendants breached that duty and whether that breach was a cause of Doe 1's harm, these are also issues that the Court finds should go to trial. As a general proposition, in Maryland, the elements of breach and causation typically do go to a jury. To this effect, *Hardesty*, 194 F. Supp. 2d 447 at 450 from this district in 2002.

Looking at the specific facts of this case, there is a dispute of material fact as to both breach and causation. Plaintiffs have put forward evidence that the Defendants' failure to supervise constituted a breach, and that it was both a proximate cause and a cause in fact of Doe 1's assault.

Again, the Court does not find today that the Plaintiffs have definitively proved their negligence case; only that there is a sufficient factual dispute such that summary judgment is

inappropriate.

Accordingly, Defendants' motions for summary judgment as to Doe No. 1's negligence claim are denied.

The Court turns to Count -- Counts Two through Six, which are negligence claims -- gross negligence claims. And all Plaintiffs have sued a number of Defendants for gross negligence.

In Count Two, the Plaintiffs sue Defendant Sullivan, district's athletic director; Count Three, they sue Principal Crouse; Count Four, they sue Damascus High School Athletics Coach Doody; Count Five, they sue Damascus High School's Head Football Coach Wallich; and Count Six, they sue JV Football Coach Colbert.

On summary judgment, Defendant Sullivan, Count Two, Crouse, Count Three, Wallich, Count Five, and Colbert, Count Six, challenge only the gross negligence claims of Doe No. 1. They do not challenge the gross negligence claims of Does 2 through 4. But Defendant Doody, Count Four, challenges the gross negligence claims of all Does, 1 through 4.

The standard for gross negligence in Maryland is whether a defendant acted with wanton or reckless disregard for human life, citing *Stracke*, S-T-R-A-C-K-E, at -- I don't have the first part -- an A.3d case, 561 at 569. Generally, in Maryland, gross negligence goes to the jury so long as reasonable minds could disagree. To this effect, *Nero*,

N-E-R-O, at 890 F.3d 106 at 131, a Fourth Circuit case from 2018.

Here, too, the Court finds there is enough of a factual dispute as to whether Defendants sued for gross negligence -- who are being sued for gross negligence acted with such wanton or reckless disregard for the Plaintiffs' rights and lives that they should be processed. The Court summarizes the critical factual disputes as follows:

As to Count Two, Plaintiffs have presented evidence that Defendant Sullivan, as director of system-wide athletics, admitted in his deposition he was responsible for enforcing rules, including mandatory training regarding hazing required for school athletic departments. A reasonable jury could conclude that Sullivan's alleged systematic failure to ensure that athletic coaches took their training and appropriately supervised the students as required, whether that amounts to wanton or reckless disregard as to Doe No. 1.

As to Count Three, Plaintiffs have presented evidence that Defendant Crouse admitted in her deposition that she knew lack of supervision in the Damascus boys locker room could lead to the kind of harm that Doe No. 1 suffered, and that her allegedly repeated failure to ensure that coaches were performing their supervisory duties amounted to reckless -- wanton or reckless disregard as to Doe No. 1.

With regard to Count Four, and this is the count as to

Defendant -- presented by Defendant Doody, the Court finds the Plaintiffs have presented evidence including the following: That Defendant Doody was responsible for implementing the mandatory training and supervision policies at DHS being the athletics director there, but that he failed to do so.

That Defendants Wallich and Colbert, subordinates of Doody, said in their depositions that Doody never informed them of their -- of the supervisory policy.

Next, that Defendant Doody failed to act when he received complaints about lack of supervision.

Next, Doody had taken a training course that specifically mentioned brooming as the form of attacks as a risk in an unsupervised athletic locker room.

And further, that Defendant Doody knew that J.C.A., the individual known as J.C.A., the student, posed a danger to other students.

The Court finds that this is sufficient to create a dispute of material fact as to whether Doody acted with wanton or reckless disregard as to all Does.

As to Count Five, Defendants have presented evidence that Defendant -- sorry -- Plaintiffs have presented evidence that Defendant Wallich failed to supervise the JV football team for years, that he admitted that he thought he did not need to supervise the JV team, and that he may have failed to complete a required training. These facts could lead a reasonable jury

to conclude that he acted with wanton or reckless disregard as to Doe No. 1's safety and security.

As to Count No. Six, Plaintiffs have presented evidence that Defendant Colbert failed to follow the school's supervision policy and may have failed to complete a required training. These facts could lead a reasonable jury to conclude that he acted with wanton or reckless disregard as to Doe 1's safety and security.

Accordingly, the motions for summary judgment of Defendant Sullivan, Count Two, Defendant Crouse, Count Three, Defendant Wallich, Count Five, and Defendant Colbert, Count Six, as to Doe 1's gross negligence claims, are denied. In addition, Defendant Doody's motion for summary judgment as to all Does' gross negligence claims, Count Four, denied.

The Court turns to Count Seven, the Title IX claim.

All Plaintiffs have sued the Board of Education for Title IX violations. This is Count Seven. And the Board has moved for summary judgment with respect to all Plaintiffs' claims.

The Court will address the disputes on this count in the order in which counsel for the Board presented them during oral argument.

First, the Board argues that it is not liable for punitive damages under Title IX, and, indeed, the Fourth Circuit has instructed that punitive damages are not available under that statute as it did in *Mercer vs. Duke University* at

50 Federal Appendix 643, 644, from the Fourth Circuit, 2002.

Accordingly, the Court grants summary judgment to the Board to the extent that the Plaintiffs seek punitive damages on Count Seven.

Second, the Board argues that emotional damages are not available to Plaintiffs under Title IX pursuant to a recent Supreme Court decision in *Cummings vs. Premier Rehab Keller, PLLC*, at 142 Supreme Court 1562, a 2022 decision. In *Cummings*, the Court held that damages for emotional distress are not available for statutes adopted under the suspending -- the spending clause. While Title IX was not directly at issue in *Cummings*, the Board suggests that that holding applies to all spending clause litigation, including the present action under Title IX.

The Board may well be correct that *Cummings* prevents Plaintiffs from recovering emotional distress damages on their Title IX claim, but as Mr. Maloney pointed out during oral argument, the applicability of *Cummings* to Title IX claims specifically appears to be a rapidly moving landscape, with various district courts reaching different conclusions.

In light of this rapidly moving landscape, the Court finds it unnecessary to decide the *Cummings* issue on summary judgment. Damages may, and often are, limited in various ways after the jury renders its verdict, and the Court prefers to revisit the *Cummings* question after trial, perhaps when the

case law about its applicability has been more fully developed.

But relatedly, the Court would make two points. First, a jury typically does not award emotional damages per count; they just enter one number on the verdict sheet, and, obviously, there will be a verdict sheet in this case. Emotional distress damages would be available both with respect to Plaintiffs' negligence claims and with respect to gross negligence claims against the Board. If the Board is found liable in both negligence -- or either count of negligence, as well as for Title IX violations, there would not be separate emotional distress numbers reached. They would be the same.

Also, even if emotional damages are not available under Title IX, that decision in *Cummings* says nothing about damages available for the actual violation, the impact, if you will, of the bodily integrity that occurs when there is a kind of violation that occurred here, and that's not necessarily emotional damages, so that, arguably, would be another component to allow what, in effect, would be compensatory damages under that count.

So while Plaintiffs may ultimately be barred from recovering emotional damages for their -- with respect to their Title IX claim, the Court has just expressed a distinction between the moment of impact and emotional sequelae that might also be involved.

Accordingly, the Board's motion for summary judgment as

to emotional distress damages under Title IX, Count Seven, is denied without prejudice.

The Court turns, however, to some of the evidence with respect to the Title IX claim that has been brought into question.

The elements of a Title IX claim under -- and this Court is basing this on *Jennings vs. University of North Carolina* at 482 F.3d 686 at 695, a Fourth Circuit decision from 2007 -- first, that the Plaintiff was a student in an educational institution receiving federal funds; second, if the student was subjected to harassment based on sex; third, that the harassment was sufficiently severe or pervasive to create a hostile or abusive environment in an educational program or activity; and fourth, that there is a basis for imputing liability to the institution.

At oral argument, the Board's first merits-based argument addressed the fourth element, whether there was a basis for imputing liability to it. An institution can be held for -- liable for a Title IX violation only if an official who has authority to address the alleged discrimination and to institute corrective measures has actual knowledge of the discrimination in the institution's programs and fails adequately to respond or displays deliberate indifference to discrimination. That, again, is from *Jennings*, citing *Gebser*, G-E-B-S-E-R, from the Supreme Court, 524 U.S. 274, 290.

The Court then first considers the element of appropriate person.

The Board's merits arguments as to Title IX begin with the proposition that only Defendant Crouse and no other school official, which would include Defendants Sullivan, Doody, Wallich, and Colbert, were appropriate persons, but allowing that Defendant Crouse might be.

An appropriate person is, at a minimum, an official with authority to take corrective action to end the discrimination. This is the *Gebser* case just cited by the Court, 524 U.S. 274 at 290.

Defendants argue that only Crouse can be considered an appropriate person because she is the only one who had authority to hire, fire, or discipline a personnel responsive to the discrimination.

The Defendants' view of appropriate person appears to derive from the Fourth Circuit case of *Bayard* [sic] at 268 F.3d 228 at 239, Fourth Circuit, 2001.

But the Court finds that more recent Fourth Circuit law suggests that *Baynard* -- I said *Bayard*, it's *Baynard* -- that definition may be too narrow. In the *Jennings* case, the Fourth Circuit appeared to abandon its bright line rule that an appropriate person is only an official who can hire, fire, and discipline in favor of a more fact-intensive inquiry of the official's actual authority and extent of notice of the

discrimination. This would be in *Jennings*, 482 F.3d 686 at 700 from the Fourth Circuit, 2007.

At a minimum, taking *Baynard* and *Jennings* together, the Court believes it demonstrates that the question of who has the power to take corrective action is fact-specific and inappropriate for resolution on summary judgment.

And that being said, the Court believes that a jury could reasonably conclude, under *Jennings*, that other school officials had authority to take corrective action because they could, for example, remove or discipline players on the football team.

The Court also raises an estoppel concern. School students are told -- students are told by the school to report sexual harassment to school staff or the principal. If the Court were to adopt Defendants' position, that would mean that students who suffered sexual harassment or abuse and relied on school policy simply to report it to a teacher could be denied a Title IX claim because they had not made the report to an appropriate person. This would not be a particularly satisfactory result. In any event, the Court does not accept that only -- at this juncture anyway -- Defendant Crouse would be an appropriate person.

The next concept under Title IX is actual notice.

The Board argues that Defendant Crouse, or anyone else who might be an appropriate person, could -- they argue that

they did not have actual notice of the harms Plaintiffs suffered.

The Board's chief argument on this point is that actual notice for Title IX purposes requires that the appropriate person have the name of the victim and/or the assailant. The Court disagrees.

The Fourth Circuit has previously explained that the standard for actual notice is met when an appropriate official is alerted to the possibility of misconduct that a reasonable person would construe as prohibited by Title IX. The Court, in this regard, cites *Doe vs. Fairfax County School Board*, 1 F.4th 257 at 266-68 from the Fourth Circuit, 2021.

Davis 1 -- excuse me. Doe 1 concedes that the Board may not have had actual notice of prior brooming incidents before his assault. But that does not foreclose his Title IX claim. Doe 1's counsel has cited evidence that locker room assaults were a known risk to school officials prior to August 2017. And by November 2017, Crouse and other officials at the school had been informed of Doe 1's assault, and that their failure to ask for names of the victim and perpetrator, to investigate further, or take other action amounted to deliberate indifference. And all the while Doe 1 was taunted and threatened by teammates and other students in a way that arguably interfered with his educational opportunities.

As to Does 2 through 4, their proof of actual notice is

stronger. To summarize, they have offered the following evidence:

By November 2017, Plaintiff Principal Crouse -- excuse me, Defendant Principal Crouse and others were aware of Doe 1's assault. In September 2018, officials were informed the players were getting threatened with brooms and poked in the buttocks. Next, the Board apparently had knowledge of at least one report of brooming or other sexual assaults in locker rooms in other high schools prior to October 31, 2018. Defendant Crouse was informed of, or was deliberately indifferent to, so the evidence might suggest, multiple reports of actions by the student J.C.A., who was one of the assault perpetrators, his history of posing a danger to other students.

The Court is satisfied that all Doe Plaintiffs have raised a factual dispute as to whether any appropriate person had actual notice of Title IX misconduct in this case.

With regard to the deprivation of educational opportunities, the Board challenges that Does 1 and 2 have not shown they were deprived of access to educational opportunities or benefits because they did not change schools, they did not -- that they continued playing football, and that they graduated on time.

A sexual harassment or assault victim can be said to have been deprived of access to educational opportunities or benefits in several respects, including when the harassment

results in the physical exclusion of the victim from an educational program or activity; when the harassment so undermines and detracts from the victim's educational experience as to effectively deny them equal access to an institution's resources or opportunities; or three, where the harassment has a concrete, negative effect on the victim's ability to participate in an educational program or activity. To this effect, the Court cites *Jennings*, 482 F.3d at 699.

Based on what the record suggests about how Does 1 and 2 experienced a variety of severe anxiety symptoms and suffered negative effects as to their grades and social lives, the Court is satisfied there is a question of material fact here as to whether Does 1 and 2 have shown sufficient deprivation, particularly under either the second or third theories from *Jennings*.

As such, then, the Court rules that the Board of Education's motion for summary judgment on the merits of Plaintiffs' Title IX claim, Count Seven, is denied.

The Court turns to Counts Eight through Ten, which are claims under 42, U.S.C., Section 1983.

All Plaintiffs have brought 1983 claims against Defendant Sullivan, Count Eight, Defendant Crouse, Count Nine, and Defendant Wallich, Count Ten. They are all sued in their individual capacities.

At the beginning of the present opinion, the Court

granted summary judgment to the Defendants to the extent that their motions were unopposed. That leaves the following portions of summary judgment that the Court now must resolve:

First, as to Count Eight, Does 2 -- Does 2 through 4 oppose summary judgment against Sullivan on the supervisory liability theory. As to Count Nine, Does 2 through 4 oppose summary judgment in favor of Defendant Crouse on both the state-created danger and supervisory liability theories. And as to Count Ten, all Does, 1 through 4, oppose summary judgment in favor of Defendant Wallich on the supervisory liability theory.

Before considering the two theories under which Plaintiffs sue, the Court considers a question that came up during oral argument. Counsel for Defendants suggested that Plaintiffs' 1983 claims have been brought pursuant to *Monell vs. Department of Social Services of the City of New York*, 436 U.S. 658, a '78 case from the Supreme Court. A *Monell* claim is one brought for monetary recovery against a local municipality where officials have acted unconstitutionally pursuant to local law, policy, or custom.

This is not a *Monell* claim. It is a claim brought against Defendants in their individual capacities for policies that they either failed to implement -- that they failed to follow or they failed to implement. So the Court, therefore, rejects any suggestion that this is a masqueraded *Monell* claim.

Let me look at the two aspects of the 1983 claims that have been further discussed. First is the state-created danger theory, that is, that somehow Defendant Crouse particularly created a danger that should be actionable. It is -- this claim is only as to Does 2 through 4.

To establish Section 1983 liability based on a state-created danger theory, a plaintiff must show that the state actor created or increased the risk of private danger and did so through affirmative acts, not merely through inaction or omission. To this effect, *Doe vs. Rosa*, 795 F.3d 429 at 439 from the Fourth Circuit, 2015.

Here, the parties generally disagree about what Defendant Crouse did in terms of her conduct. What they dispute is whether that conduct should be considered an affirmative act or merely an omission.

For example, the parties agree that the football team was not in study hall as they had been, but they do not see eye to eye on whether this was a result of Crouse's omission, on the one hand, that is, her failure to do anything to reimpose study hall, or if Crouse took affirmative action to cancel the study hall. These are philosophical arguments which the Court really can't resolve at this point. But certainly, arguably, terminating a policy and not putting it in place could be considered omission, but it's also an affirmative act. It's not the kind of thing on which responsibility and

accountability would rest. For present purposes, it certainly would suffice as an affirmative act.

Likewise, there is a disagreement under this count as to causation, whether Crouse's conduct, like cancelling study hall or removing the interventions put in place to monitor J.C.A., the problematic student who was a perpetrator, whether that created or enhanced danger to Does 2 through 4 with respect to possible assaults.

In the Court's view, these questions cannot be decided as a matter of law. Each side has cited its own plausible facts as to why their conclusions should be given credit.

But the Court now denies counsel's motion for summary judgment, Count Eight, that is the 1983 claim, with regard to the state-created danger theory advanced by Does 2 through 4.

The second aspect under 1983 is the supervisory liability claim. And here, Plaintiffs make the supervisory liability claim for applicability of the 1983 claim. In Count Eight, Does 2 through 4 as to Defendant Sullivan; Count Nine, Does 2 through 4 as to Defendant Sullivan; Count Ten, all Does, 1 through 4, as to Defendant Wallich.

To recover under a theory of supervisory liability, the Plaintiff must establish the following elements:

One, the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to

citizens like the plaintiff; second, that the supervisor's response to that knowledge was sufficiently inadequate so as to show deliberate indifference to, or tacit authorization of, the alleged offensive practices; and third, that the affirmative causal link between the supervisor's inaction and the particular constitutional injury existed and was suffered by Plaintiff. To this effect, the Court cites *Shaw v. Stroud*, 13 F.3d 791 at 799, a Fourth Circuit case from 1994.

Defendants Sullivan, Crouse, and Wallich raise three primary challenges on this point. First, they posit that Sullivan and Wallich were not supervisors because they did not have subordinates. They do concede that Crouse was a supervisor.

Second, they say that Principal Crouse and Defendants Sullivan and Wallich, to the extent the Court finds they were supervisors, had no actual or constructive notice that the manner in which a subordinate employee supervised the football players posed a pervasive or unreasonable risk of constitutional injury, and that even if it did, they did not act with deliberate indifference such that they should be held liable.

And third, the Defendants argue that this theory is not applicable because violations of the constitutional rights were perpetrated by private actors, students, who do not have a supervisor/subordinate relationship with the individual

Defendants.

The Court considers each argument in turn.

As to whether Defendants Sullivan and Wallich were a supervisor, the Court finds that this is a question of fact about which there is a material dispute. Defendants' perspective is a formal one. They say Sullivan and Wallich were not supervisors based on their job descriptions and relative locations in the district hierarchy. For their part, Plaintiffs have cited evidence that Defendants Sullivan and Wallich, in fact, were supervisors.

Sullivan admitted in his deposition he had oversight over athletics and the ability and authority to discipline others, particularly by certifying coaches or decertifying them, preventing them from continuing to coach if they failed to take mandatory training. And, again, this is mandatory training with regard to such things as hazing.

And that also Defendant Wallich was the head football coach at Damascus and had responsibility for delegating tasks to JV Coach Colbert.

The factual dispute over whether Defendants Sullivan and Wallich can be considered supervisors is material. It cannot be decided on summary judgment. And with that in mind, the Court is not going to grant summary judgment as to that theory.

Defendants then argue that Defendants Sullivan, Crouse, and Wallich had no actual or constructive notice that the

manner in which a subordinate employee was acting or failing to act posed a pervasive or unreasonable risk of constitutional injury to Plaintiffs, and that even if they did, their actions were not deliberately indifferent such that they should be held liable.

There are also material disputes of fact on this point that the Court believes preclude summary judgment.

Plaintiffs have cited evidence that Defendant Crouse knew of the risk that J.C.A. posed to other students but that she failed to ensure that Wallich and/or Colbert were adequately supervising him. Further, Plaintiffs suggest that prior to October 31, 2018, the date of the assaults, that Sullivan was aware of the brooming assault on Doe No. 1 but failed to ensure that adequate supervision by the Damascus coaches had been -- was in place, or that the coaches had completed the required training as to actions in the locker rooms.

And further, Wallich knew or should have known, according to Plaintiffs, that Colbert was not providing adequate supervision in the locker room both in August 2017, as to Doe No. 1, and on October -- in October 2018 as to Does 2 through 4.

Based on these facts, among others, a reasonable jury could conclude that Defendants Crouse, Wallich, and/or -- Crouse, Sullivan, and/or Wallich had notice that subordinate employees were failing to supervise and/or complete mandatory

training on hazing, and that their responses to this notice was deliberately indifferent.

Finally, the argument made by Defendants Crouse, Sullivan, and Wallich is that supervisory liability, that theory, is not applicable to them because other students committed the assaults and Defendants did not have a subordinate/supervisor relationship with those students.

The Court believes, candidly, Defendants have misunderstood and misstated the standard for supervisory liability.

Defendants do not need to show that -- need not have conducted the assault themselves in order to be liable under this theory. It is sufficient if they participated in any conduct, quote, that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff, end quote.

And in this case, then, the question is not whether the subordinates, themselves, perpetuated the sexual acts, but whether the subordinates' failure to supervise the locker room, among other alleged conduct, created a pervasive or unreasonable risk of constitutional injury.

And viewed in this light, the question of whether Defendants' alleged conduct rises to the actionable level under the supervisory liability theory is one for a fact finder to decide.

Accordingly, the Court would, as to Sullivan's motion for summary judgment as to Count Eight, the supervisory liability theory brought by Does 2 through 4, is denied; that is, Defendants' motion in that respect is denied.

As to Defendant Crouse's motion for summary judgment as to Count Nine, again, the motion that challenges supervisory liability as brought by Does 2 through 4, is denied.

With regard to Defendant Wallich's motion for summary judgment as to Count Ten, the supervisory liability theory as brought by Does 1 through 4, is denied.

There is the matter of qualified immunity that has been raised by the Defendants.

Defendants Sullivan, Crouse, and Wallich also argue that to the extent any of the 1983 claims against them would otherwise survive, they are entitled to qualified immunity because it was not clearly established either in 2017 or '18 that the constitutional right Plaintiffs accuse them of violating existed, nor was it clearly established that their conduct violated that right.

The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. This according to *Pearson* at 555 U.S. 223 at 231, a 2009 case from the Supreme Court.

A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he or she is doing violates that right, again citing to the Supreme Court, *Reichle*, R-E-I-C-H-L-E, 566 U.S. 658 at 664, a 2012 case.

Defendants argue that the constitutional right at issue in this case is more specific than the right to be free of physical assault. Instead, they zero in on the so-called right to be free from deliberate indifference from school officials as to student-on-student sexual harassment, a right they doubt even exists today, and one they say certainly was not clearly established in 2017 and '18. Plaintiffs, of course, dispute this narrowing, urging the Court to focus more broadly on the right to be free from physical assault.

The Court believes the Defendants are splitting nonexistent hairs. Certainly, in 2017, '18, it was well established that Plaintiffs had a fundamental right to bodily integrity, including the right to be free from physical assault. In this sense, it's immaterial whether the assault here was sexual in nature. At its core, it was a physical assault. And the Court, in this respect, cites *Ingraham vs. Wright* at 430 U.S. 651, 673 to 674, and *Jones vs. Wellham* from the Fourth Circuit in 1997, 104 F.3d 620, 622. It was well established that school officials owed a special duty of care to their students, with regard to the safety and security of

their students, as *in loco parentis*. The Court is satisfied that in 2017 and 2018, there is evidence that Defendants were fairly on notice, that -- that they were indifferent to the possibility of locker room assault, among other conduct, and that it could result in constitutional violations.

Accordingly, the motions of Defendants Sullivan, Crouse, and Wallich for summary judgment as to qualified immunity on the 1983 claims are denied.

The Court speaks now to damages.

Separately Defendants Sullivan, Crouse, and Wallich argue they should not be liable for punitive damages on the 1983 claims.

The standard for punitive damages under 1983 is whether a defendant acted with reckless or callous indifference to the federally protected rights of others. To this effect, *Smith vs. Wade*, 461 U.S. 30 at 56, a 1983 case from the Supreme Court.

Again, the Court has already acknowledged in the context of other counts that there is a material dispute of fact here. Plaintiffs have put forward evidence that a reasonable jury could conclude that reckless or callous indifference occurred here, such as Defendant Sullivan's failure to ensure that coaches completed mandatory hazing -- mandatory training as to hazing and that they adequately supervised the locker room even though he knew of multiple prior assaults at Damascus and,

indeed, at other high schools in his district.

Plaintiffs also cite Plaintiff [sic] Crouse's failure to monitor adequately the actions of J.C.A. who posed a known threat to other students.

And finally, that Wallich's failure to ensure adequate supervision of the locker room also posed a risk, knowing the risk that the individual J.C.A. posed.

Accordingly, the motions for summary judgment as to Defendant -- filed by Defendants Sullivan, Crouse, and Wallich as to punitive damages on the 1983 claim are denied.

There is, then, the matter of injunctive relief.

Finally, the Plaintiffs argue -- excuse me. I am getting a little confused here and my voice is dropping. Defendants argue that Plaintiffs cannot pursue injunctive relief against them because they lack standing. They, presumably, will not -- are not any longer in the school such as they would be -- would suffer immediate injury.

It is true that granting injunctive relief is proper where Plaintiff demonstrates that he will suffer injury in fact, which is concrete and particularized, actual and imminent, not conjectural or hypothetical. To this effect, the Court cites *Proctor* at 32 F. Supp. 2d 830 at 832 from this district, 1998.

Defendants argue that Plaintiffs no longer have standing because they will never again attend Damascus, and, therefore,

are no longer at the risk of future harm.

But this is a classic example of the exception to the general rule, where a claim for injunctive relief is capable of repetition, but evading review. To this effect, *Sosna*, S-O-S-N-A, *vs. Iowa* at 419 U.S. 393 at 402, n.11, a 1975 case from the Supreme Court; and *County of Riverside vs. McLaughlin* at 500 U.S. 44 at 52, a 1991 case from the Supreme Court. Plaintiffs' time at Damascus would be limited to four years, but litigation on these types of claims regularly, and in this case, in the Court's view, have lasted much more than that.

That, then, constitutes the Court's oral opinion in the case, and, therefore, the Court will announce its specific rulings, summarizing them, will issue a written order implementing its rulings today or tomorrow.

The claims of Parent-Plaintiffs Jane Doe 2, John Doe 4, and Jane Doe 5 are dismissed.

Defendant Doody's motion for summary judgment with respect to Doe Family No. 1, ECF 222, denied in its entirety.

Defendant Doody's motion for summary judgment with respect to Doe Families 2, 3, and 4, ECF 223, denied in its entirety.

Board of Education, Vincent Colbert, Casey Crouse, Jeffrey Sullivan, and Eric Wallich's motion for summary judgment as to John Doe 1 in its second amended complaint is granted in part and denied in part.

First, the motion is granted as to Doe No. 1's 1983 claim in Count Eight against Defendant Sullivan; Count Nine, Defendant Crouse; on the state-created danger theory only in Count Ten as to Defendant Wallich -- sorry. Let me be clear about this. Let me restate that because I am still on the Defendants' multiple motion regarding the 1983 claim.

As to Doe 1's 1983 claim on Count Eight as to Sullivan, granted. And as to -- I must say, I am confused. We are not dismissing the entire count. Just on these two theories. Let me go back on this because I am not transcribing this correctly.

It's granted insofar as the unopposed claim against Defendant Sullivan in Count Eight, and as to Doe 1 and Does 2 and 4 on the state-created danger theory only. It is not an entire ruling against that count.

And in Count Ten, as to Wallich, likewise, as to the state-created danger theory only.

And to the extent that any damages are sought in a punitive nature on Title IX, that part is granted.

The motion, then, under ECF 227, is denied without prejudice with respect to Doe 1's claims for emotional distress on Count Seven, Title IX; and then the motion is denied as to Doe 1's claim of negligence on Count One against the Board, Sullivan, Crouse, Wallich, and Colbert; Doe 1's claims of gross negligence, Counts Two against Sullivan, Three against Crouse,

Five against Wallich, and Six against Colbert; as to Doe 1's Title IX claim, Count Seven; as to Doe 1's 1983 supervisory liability claim as to Wallich, Count Ten; and as to Doe 1's demand for punitive damages on his gross negligence claim, Counts Two, Three, Five, and Six, and for his 1983 claim, Count Ten; Doe 1's demand for injunctive relief also, the motion is denied.

As to the motion for summary judgment of Defendants Board, Colbert, Crouse, Sullivan, and Wallich as to John Does 2M, 3, and 4M claims at ECF 228, that motion is granted in part and denied in part. The motion is granted with respect to the state-created danger theory that is posed against Defendant Sullivan in Count Eight and against Defendant Wallich in Count Ten; also to the extent that the punitive damages are demanded for the Title IX claim, the Court having said that punitive damages are not recoverable under Title IX.

The motion with respect -- we are back now on the motion to the claims for emotional distress under Count Seven. The Court has held that the motion is denied as to Doe 2 through 4's claims of negligence, Count One, against the Board, Sullivan, Crouse, Wallich, and Colbert; as to Doe 2 -- excuse me. This was as to Doe 2 through 4. It's -- as to the claim of negligence, Count One, it's denied.

This is the motion against the Board, Sullivan, Crouse, Wallich, and Colbert, Does 2 through 4's claims of gross

negligence against Sullivan, Count Two, Crouse, Count Three, Wallich, Count Five, Colbert, Count Four, denied.

The motion as to Doe 2 through 4's Title IX claim, Count Seven, denied.

The motion as to Doe 2 through 4's 1983 claims pursuant to the supervisory liability theory only, Counts Eight, Sullivan, Nine, Crouse, and Ten, Wallich, denied.

Count [sic] 2 through 4's 1983 claims pursuant to the state-created danger theory, Count Nine, as to Crouse, denied.

Doe 2 through 4's demands for punitive damages based on their gross negligence claims, Counts Two through Six, and the 1983 claims, Eight Through Ten, are denied.

And Doe 2 through 4's demand for injunctive relief, denied.

Now, I think I got it all out there. We will give you the papers, and you can take them home tonight and read them and see whether you have any serious issues, but as far as the Court is concerned, it is prepared to enter an order, with perhaps a little more clarity than I spoke at the end there, based on the opinion that it renders now.

Again, just to remind, we are going to hand out to you now copies of the Court's notes. It is -- they are not official. What is official is what the Court has said to the court reporter, and I did a little bit of editing as I went along. So, I don't think I substantively changed anything, but

this will help you I think grasp where the Court is.

There are -- are there any non-humorous comments anyone would like to make?

MR. MALONEY: Your Honor, in view of the Court's rulings, from a scheduling perspective, what happens next?

THE COURT: Well, how do you feel about discovery? Are you done? Are we all done on discovery?

MS. KANE: No, Your Honor.

THE COURT: You are saying no?

MS. KANE: No, we are not. The Defendants had reserved two hours each for the Plaintiffs on their -- their condition between the time when they had been deposed previously and the time of trial, so theirs still need to be scheduled and taken. The Court had authorized that.

THE COURT: Well, you know, this is a case where I am perfectly willing to work with counsel in terms of what fits your needs in the case. So if you think there is further discovery -- I mean, that's where you are, really. You need to complete your discovery. And then we need to -- I think we should book you in for a trial date soon, and that will give you a bookend there to make you get things done. I don't anticipate any other motions short of perhaps some in limine motions before trial, but even then, I don't know.

I think it should be pretty clear what the roadmap is at this point. Why don't counsel consult --

MR. MALONEY: Very well.

THE COURT: -- see what amount of time you need, and I think -- I might just sort of pose this to you now: What kind of trial time do you think you need? Do you need three weeks for this?

MR. MALONEY: That's our thinking.

THE COURT: Three weeks?

MS. KANE: Probably four, Your Honor.

THE COURT: Well, I'd probably be looking for a trial in February. We will just set aside the month of February, and that will give you a bookend on that to make you sort of get your act together and get things done. But you need to submit something to the Court before that and tell me where you are going to end discovery, we will bookend a pretrial conference probably sometime in the first part of January, and between now and then, I don't anticipate that there would be much that I would see you in court over. It seems unlikely.

And, of course, you know, looking down the road -- I mean, I will give you when we sit at our pretrial conference -- this is the kind of situation where I would, obviously, expect a special verdict sheet, and you need to think about that in the meantime, and appropriate voir dire, which I will tell you I want to be joint, appropriate instructions, which I hope that you can work on jointly, and when you disagree, use the same number -- I will say all this in my pretrial order to you --

but that's where you work together and try and get the same agreement as to the appropriate instructions, and then we will have a pretrial conference to see where we are.

MR. MALONEY: Your Honor, we will confer jointly with counsel and maybe give the Court a joint status report by Monday.

THE COURT: Well, right. And then I think we have to book in, according to our schedule, when you can come in for -- indicate as well, when you get back to me, if we save the whole month of February, which is I think pretty much clear for me now -- you won't be here so you don't know really.

MS. HANNIBAL: When we talked about it, you said we were looking at January, February, and March.

THE COURT: Well, January, I just booked in another long trial. I think you need to tell us --

MR. MALONEY: Your Honor, one issue I raised, and it may be something that can't be fixed, a number of the Plaintiff students are now college students, and, of course, maybe they won't be able to come. I don't know if the Court has any availability in January, or maybe not.

THE COURT: For? Sorry. Oh, for -- I just booked in a rather long trial for January where everybody is telling me that it should have been done either next month or in 2025.

MR. MALONEY: Well, let us confer.

THE COURT: See where you are on that.

MS. KANE: We need to confer with our clients as well, Your Honor, as to the dates.

THE COURT: Right. And then, of course, I say, as I always do in these cases, if you want to refer the matter to a magistrate judge for settlement discussions, I can do that.

MR. MALONEY: Thank you. We have had mediation discussions with Judge Connelly who is still involved in the case.

THE COURT: He is?

MR. MALONEY: He is.

THE COURT: Okay. Good enough.

All right, folks. Anything else?

Lindsay will give out as many copies as we have there. Is the press here at all? Make sure that -- make sure she has a copy and then make sure that there are enough.

Okay. All right, folks.

(The proceedings were concluded at 3:11 p.m.)

C E R T I F I C A T E

I, Renee A. Ewing, an Official Court Reporter for the United States District Court for the District of Maryland, do hereby certify that the foregoing is a true and correct transcript of the stenographically reported proceedings taken on the date and time previously stated in the above matter; that the testimony of witnesses and statements of the parties were correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription to the best of my ability; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

Renee A Ewing

Renee A. Ewing, RPR, RMR, CRR
Official Court Reporter
May 4, 2023